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No. 84-449

In the Supreme Court of the United States

OCTOBER TERM, 1984

ROGER SWIFT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly instructed the jury that a public official who demands payment from a private person in exchange for services may be guilty of extortion under color of official right, in violation of the Hobbs Act, even if the possibility of payment was first raised by the private person.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A7) is reported at 732 F.2d 878.

JURISDICTION

The judgment of the court of appeals (Pet. App. A10) was entered on May 21, 1984, and a petition for rehearing was denied on June 22, 1984 (Pet. App. A11). The petition for a writ of certiorari was filed on September 19, 1984, and is therefore out of time under Rule 20.1 of the Rules of this Court (see Pet. App. A14-A15).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of extortion under color of official right, in violation of the Hobbs Act, 18 U.S.C. 1951, and sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. A1-A7).

1. a. The evidence at trial, the sufficiency of which is not in dispute (Pet. 12), showed that petitioner used his position as sewer director of Key West, Florida to obtain money from CFW Construction Company, which was building several sewage pumping stations for the city, in exchange for securing approval of CFW's requests for progress payments on its contracts and other benefits (Pet. App. A3). A city engineer asked Bobby Joe McBee, CFW's project manager, to meet with petitioner on May 29, 1982. At the meeting, petitioner told McBee that certain people in Key West needed to be "taken care of" to ensure that the job proceeded smoothly. McBee communicated petitioner's demand to CFW's vice-president. Although CFW refused to pay, petitioner persisted in asking McBee for money once or twice each week. Tr. 114-120.

Petitioner's insistence intensified during December 1982. McBee said that CFW would respond after Christmas. On January 10, 1983, McBee reported petitioner's demands to the Federal Bureau of Investigation. The following day, the FBI wired McBee with a tape recorder before a meeting with petitioner. Petitioner was recorded at the meeting explaining what he could do for CFW in connection with job inspections and progress payments. He also wrote a schedule of payments that he expected McBee to make. Petitioner demanded an immediate payment of $25,000 and a later payment of $20,000. Tr. 123-129, 138-150.

The payoff occurred on January 13, 1983, during a second recorded meeting. McBee tried to convince petitioner to accept only $5,000, but petitioner insisted on the full $25,000. Petitioner reiterated the quid pro quo: he would obtain the votes of the city councilmen whenever CFW needed them; he would process CFW's payment requests as soon as they were received; he would eliminate any problems with the city engineer; and he would resolve

any other problems that CFW was having with the project. McBee then gave petitioner the $25,000. Tr. 151-159.

Petitioner acknowledged what had occurred during his recorded conversations with McBee and admitted that he, not McBee, had first specified the amount of the payments. He claimed, however, that McBee had contacted him first in August or September 1982 and had entrapped him into accepting the money. Tr. 413-417, 422, 496, 553-554.

b. The district court charged the jury that the government was required to prove that petitioner "induced Bobby Joe McBee to part with $25,000" and that he "did so knowingly and willfully by means of 'extortion' " (Tr. 575). After the jury had retired and begun its deliberations, the foreman submitted two questions to the court. The questions, together with the answers initially given by the court, were as follows (Pet. App. A4; Tr. 597-598):[1]

Question 1:	Is it necessary for [petitioner] to approach McBee first to be an act of extortion?
Answer:	Yes.
Question 2:	If CFW (McBee) offers the money first, is it still extortion (if [petitioner] accepts the money)?
Answer:	Yes, if you find beyond a reasonable doubt that it was in response to a demand by [petitioner].

Approximately three hours later, the jury submitted another question to the court (Pet. App. A4-A5; Tr. 601):

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[1] A third question submitted the same morning inquired of the difference between accepting a bribe and extortion. The court responded, " 'Please confine yourselves to the offense charged, *i.e.* extortion with the definition given you.' " Pet. App. A4.

Question: If CFW or McBee offer "some money" for help in resolving problems and [petitioner] stated a dollar amount, $25,000, and then the money is paid — is this extortion?

Following discussion with counsel, the court replied (Pet. App. A5; Tr. 611; 614):

Answer: Upon further reflection and research the answer to the first of three questions you submitted this morning should have been a "no" answer rather than "yes."

The answer to this jury question, as stated above, is "yes."

The issues remain for you to decide whether the Government has proved beyond a reasonable doubt both of the following:

One, whether [petitioner] committed extortion as defined in the instructions of law; and if so,

Two, whether [petitioner] had the predisposition to commit the offense as defined in these instructions.

* * * * *

In arriving at your verdict you are reminded to consider all of the evidence and all of the court's instructions.

Petitioner objected to the court's new answer to the first question and its response to the last question on the ground that he could not be found guilty unless he initiated the demand for payment (Tr. 601-610).

2. The court of appeals affirmed, holding that the district court correctly answered the jury's questions (Pet. App. A6). The court of appeals reasoned that "[i]t is clear in this case that the evidence showed that [petitioner] was acting under color of official right when he accepted the payments from McBee," and hence there was no merit to petitioner's argument with respect to who initiated the discussion of payments (*ibid.*).

ARGUMENT

Petitioner contends (Pet. 9-12) that the jury was erroneously instructed that he could be found guilty of extortion under color of official right even if his victim made the first mention of a payment, and that the decision affirming his conviction conflicts with *United States* v. *O'Grady*, 742 F.2d 682 (2d Cir. 1984) (en banc). His petition is out of time; in any event, his argument lacks merit. Review by this Court is unwarranted.

The district court charged the jury that petitioner must have "induced" the payment of money "willfully by means of 'extortion' " (Tr. 575). Petitioner agrees with this instruction (Pet. 7-8); his objection is that, in answering the jury's questions, the court did not require that he be the first to have raised the subject of payments. In fact, however, in an instruction that was unduly favorable to petitioner, the court responded to the jury's second question by requiring proof that petitioner demanded the money before it was offered to him. See page 3, *supra*. Moreover, petitioner admits (Pet. 12) that the evidence was sufficient to support a conclusion that he demanded the money under color of his office from CFW.

Conceding (Pet. 2-3, 10) that the weight of authority is against him, petitioner relies solely on the Second Circuit's recent decision in *United States* v. *O'Grady*, *supra*. That reliance is misplaced for several reasons. First, there is

absolutely nothing in *O'Grady* that requires the public official to make the initial mention of payments. The court stated only that the Hobbs Act requires "proof that the public official did something, under color of his public office, to cause the giving of benefits" (742 F.2d at 687; citation omitted). Moreover, nothing in the jury instructions here negated any element of the extortion offense as interpreted in *O'Grady*. Indeed, the precise instruction with which the *O'Grady* court found fault was the statement that " '[t]he Government need not show that the defendant in words or otherwise induced, requested, demanded, or solicited the benefits' " (*id.* at 686). Here, in contrast, the jury was instructed that inducement was necessary.

Further, there was ample evidence here of the sort of conduct that the Second Circuit considered to be within the statute. The court in *O'Grady* explained (*id.* at 688-689):

> While the government is not required to prove that the public official demanded or directly solicited the benefits received, or that he offered a specific *quid pro quo* in exchange for the benefits, * * * the government must show that the power of public office was misused in such a way as to induce the giving of benefits.

The court elaborated that inducement could be proved circumstantially by evidence of an official's offer of a quid pro quo in exchange for payment. Here such a quid pro quo plainly existed: it is uncontroverted that petitioner offered to facilitate various aspects of the sewer construction project in exchange for $45,000. The court in *O'Grady* distinguished similar cases, including one where "payment [was] made after 'assurances that there would be no obstacles' to construction of [a] hotel project," [2] on the ground that their facts "establish conduct from which inducement can readily

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[2] *United States* v. *Jannotti*, 673 F.2d 578, 596 (3d Cir.) (en banc), cert. denied, 457 U.S. 1106 (1982) and Nos. 83-1891, 83-1892 (Oct. 9, 1984).

be inferred" (742 F.2d at 689). The same is true here. For these reasons, and in light of the instruction favorable to the defense on the inducement issue (in answering Question 2, page 3, *supra*), it is clear that petitioner's conviction would be affirmed under the standards set forth in *O'Grady*. Accordingly, there is no conflict requiring review by this Court.[3]

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[3]Petitioner proceeds from the premise that *O'Grady* is in irreconcilable conflict with the Hobbs Act decisions of other circuits, and indeed asks (Pet. 4) "only for the opportunity to stand or fall with this Court's decision to review *O'Grady*." The Solicitor General, however, did not seek this Court's review of the *O'Grady* decision, in part because of the absence of a direct conflict among the circuits. While we believe that the court in *O'Grady* erred in reversing the defendant's conviction, its discussion of the Hobbs Act does not place it in square conflict with the other circuits. Should a true conflict develop in the future in light of subsequent decisions of the Second Circuit interpreting *O'Grady*, there will be ample opportunity for the Court to review the issue. This Court has, since *O'Grady*, already denied certiorari in a Hobbs Act extortion case. *United States* v. *Jannotti, supra*. In any event, even if there were a conflict with *O'Grady*, this case, involving ample evidence of inducement and an instruction favorable to the defense on the issue, would not be an appropriate one in which to resolve it.

Petitioner raises two additional issues at the close of his petition (page 12 n.5). Even if these are considered properly presented (see Sup. Ct. R. 21.1(a)), they are without merit. The first argument is nothing more than a restatement of the position taken in the petition. The court's instructions concerning inducement adequately described the offense charged, and the government did not in the indictment undertake to prove that the first contact was made by petitioner. With respect to petitioner's argument concerning the entrapment charge, it is clear that the instructions placed the burden on the government of proving predisposition beyond a reasonable doubt (Tr. 578-579). The court's answer to the jury's last question, which reiterated this requirement (page 4, *supra*), surely did not negate it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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